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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-97

JAMES HIRAM FIELDS, JR., PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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Supreme Court of the United States

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JAMES HIRAM FIELDS, JR., PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner respectfully prays that a Writ of *Certiorari* issue review the judgment and opinion of the Supreme Court of South Carolina entered in this proceeding on April 16, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina was rendered and filed April 16, 1975, bearing Opinion No. 19999. The opinion is unreported to date. A Petition for Rehearing dated April 23, 1975, was filed April 24 with the South Carolina Supreme Court. The Petition for Rehearing was denied on May 5, 1975.

JURISDICTION

The opinion of the Supreme Court of South Carolina was entered on April 16, 1975. A Petition for Rehearing dated April 23, 1975, and filed with the Supreme Court of South Carolina was denied on May 5, 1975. This Court's jurisdiction is invoked under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED

1. Has Petitioner been deprived of his Constitutional right to the assistance of counsel in violation of the Sixth Amendment of the Constitution of the United States by virtue of his being tried in the justifiable absence of his chief counsel?

2. Has Petitioner been deprived of his Constitutional right of due process of law in violation of the Fifth Amendment of the Constitution of the United States by virtue of his being tried in the justifiable absence of his chief counsel?

3. Has Petitioner been deprived of his Constitutional right to confront the witnesses against him in violation of the Sixth Amendment of the Constitution of the United States by virtue of the failure of the Trial Judge to recall an out-of-state witness for the State for cross examination by Petitioner's chief counsel, said chief counsel arriving at the trial after said witness had testified and been excused?

4. Has Petitioner been deprived of his Constitutional right to confront the witnesses against him in violation of the Sixth Amendment of the Constitution of the United States by virtue of the failure of the Trial Judge to allow introduction into evidence testimony of a witness for the State who was not subject to subpoena by Petitioner, such testimony having been taken at a former trial involving the same case?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner was tried by jury at the March, 1974, term of the Court of General Sessions for York County, South Carolina, for the murder of one Marjorie Marie Hampton. The trial commenced on March 12, 1974, and concluded on March 13, 1974. Petitioner was found guilty, recommended to mercy and sentenced to life in prison. An earlier trial of Petitioner on the same charge was mis-tried.

Mr. Frank Patton Cooke of Gastonia, North Carolina, had been retained by Petitioner as his attorney from the date of Petitioner's arrest. Mr. Cooke associated Mr. Keith

A. Gatlin, of Rock Hill, South Carolina, as local counsel for procedural purposes. (Tr. 7, f. 29.) Trial preparation was handled entirely by Mr. Cooke's office.

At the call of the case for trial, Mr. Cooke was trying a murder case in North Carolina and the Trial Judge presiding in the North Carolina case apprised the Trial Judge presiding at the Court of General Sessions for York County of that fact and further advised that the North Carolina murder case would be concluded on March 12, 1974, and that Mr. Cooke would be available to participate in the trial of Petitioner on March 13, 1974. (Tr. 10, ff. 38-42.) On the basis of Mr. Cooke's absence, Mr. Gatlin made a motion for continuance and stated that he was not prepared to offer a defense for Petitioner as he had not interviewed several of the defense witnesses and that he was not prepared to go ahead with the trial of the case. (Tr. 7, f. 26 and Tr. 9, f. 35.)

Mr. Gatlin's motion for continuance was overruled and the trial begun in the absence of Mr. Cooke. Mr. Cooke did not arrive at the trial until March 13, 1974, at which time The State's case had been entirely presented.

At the end of The State's evidence, Mr. Gatlin moved for a mis-trial on the basis of the absence of Mr. Cooke and then renewed said motion at the conclusion of the trial.

Both motions for mis-trial were denied.

A Dr. Rutland, a pathologist from Gastonia, North Carolina, who had testified at the first trial of this case, also testified at the instant trial on behalf of The State. Dr. Rutland had examined the body of Marjorie Marie Hampton and testified as to the cause of death. Upon the arrival of Mr. Cooke, a motion was made to recall Dr. Rutland whose testimony had been presented on the previous day and who had been excused by the Trial Judge. (Tr. 223, f. 890 et seq.). Mr. Cooke sought to recall Dr.

Rutland as he had not had an opportunity to cross-examine the pathologist and Mr. Cooke stated to the Court that some important evidentiary matter which had come out under cross-examination at the first trial had not been testified to in the instant trial. (Tr. 223, f. 890 et seq.). Mr. Cooke emphasized the importance to Petitioner's defense of this testimony and sought the Order of the Court as Dr. Rutland was not subject to subpoena as he resided out of the State of South Carolina. The Trial Judge denied Mr. Cooke's motion and did not order the recall of Dr. Rutland.

Subsequent to the ruling of the Court that it would not recall Dr. Rutland, Mr. Cooke made a motion that Dr. Rutland's testimony from the first trial, which had been mis-tried, be introduced. (Tr. 230, f. 920 et seq.). The Trial Judge would not allow the introduction of former trial testimony and denied Mr. Cooke's motion in regard to said introduction.

Notice of intention to appeal from the verdict and rulings of the Trial Judge was timely served upon Mike S. Jolly, Sixteenth Circuit Solicitor, on March 15, 1974. The appeal was perfected and oral arguments were made before the Supreme Court of South Carolina on March 10, 1975. On such appeal, Petitioner alleged violation of his Constitutional rights to counsel and to confront witnesses against him. Same were alleged as errors by the Trial Judge in not granting Petitioner a continuance in the absence of his lead or chief counsel and the Trial Judge's failure to recall the pathologist or allow the introduction of the pathologist's previous given sworn testimony. Petitioner's conviction and sentence were affirmed by the Supreme Court of South Carolina by Opinion No. 19999, filed April 16, 1975, said opinion being dissented to by one of the Justices.

A Petition for Rehearing of the appeal dated April 23, 1975, was filed with the Supreme Court on April 24, 1975, said Petition being denied (four Justices for denial—one Justice for granting) on May 5, 1975.

REASONS FOR GRANTING THE WRIT

It is the contention of Petitioner that the Supreme Court of the State of South Carolina has decided Constitutional questions in a manner which is probably not in accord with the applicable decisions of this Court, in particular this Court's holding in *Ungar v. Sarafite,* 84 S. Ct. 841, 376 U. S. 275, 11 L. Ed. (2d) 921. Petitioner feels that *Certiorari* should be granted due to the importance of the questions involved, as they involve Petitioner's fundamental Constitutional rights to the assistance of counsel and to confront the witnesses against him.

Petitioner contends that proper resolution of these Constitutional questions is of importance, not only to himself in the instant case, but to others likely situated as being required to stand trial for the crime of murder without the assistance of one's chosen and properly prepared counsel, is in effect the facing of trial with no counsel at all.

Likewise, it seems grossly unfair and, Petitioner contends, is Constitutionally impermissable, to deny one accused of a crime the opportunity to use sworn testimony transcribed at an earlier trial of the same matter in the absence of the witness whose testimony is sought to be introduced.

As shown by the transcript, Mr. Cooke was Petitioner's chief counsel and his office, through its investigator, had handled the investigation and trial preparation. (Tr. 7, f. 26 and Tr. 9, f. 35.). Mr. Gatlin, associated for procedural purposes, (Tr. 7, f. 25) frankly admitted that he was not prepared to go forward with the case when it was

called as he was not sufficiently prepared to provide Petitioner an adequate defense. (Tr. 7, f. 26.). The transcript reveals that Mr. Cooke's absence was unavoidable and justifiable and that the case, if continued, could be tried within a day or two of the date upon which the trial actually commenced.

While each case must, of course, be determined on its peculiar set of facts, Federal cases indicate a pattern of criteria, or tests, which should be applied to each set of facts in determining whether or not a continuance should have been granted when a defendant's counsel is unavailable. These criteria or tests are succinctly summarized in *Giacalone v. Lucas,* 445 F. (2d) 1238. Stating that the "totality of circumstances" should be considered when a refusal to grant a continuance is reviewed on appeal, the Court therein stated:

> (p)roper exercise of this discretion requires a delicate balance between the defendant's right to adequate representation of counsel at trial and the public interest in the prompt and efficient administration of justice. On the one hand, a Court may not insist upon expeditiousness for its own sake, but on the other, a defendant cannot be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. What is reasonable delay varies depending upon all the surrounding facts and circumstances. [Eight cases are here cited in support of the preceding proposition.] Some of the factors to be considered in the determination of reasonableness are: the length of the delay requested; whether the lead counsel has associates prepared to try the case in his absence; whether other circumstances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel and the Court; whether the delay seems to be for legitimate reasons or whether it is purposeful and dilatory; and other relevant factors. (At 1240.)

Further elements which should be considered in motions for continuance where retained lead or chief counsel is unavailable are the good faith dealings by the defendant and his counsel with the Court and efforts taken by such counsel to keep the Court apprised of his inability to be present at the appointed time. *People v. Gordon,* 30 N. Y. S. (2d) 625. This Court's case of *Ungar v. Sarafite,* 376 U. S. 275, 11 L. Ed. (2d) 921, 84 S. Ct. 841, sheds further light upon the question of continuances due to the absence of counsel and sets forth interesting observations on the application of the criteria set forth in *Giacalone, supra.* In *Ungar* it is stated:

> . . . (a) myopic insistance upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel any empty formality. *Chandler v. Fretag,* 348 U. S. 3, 99 L. Ed. 4, 75 S. Ct. 1. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the Trial Judge at the time a request is denied *Nilva v. U. S.,* 352, 1 L. Ed. (2d) 415, 77 S. Ct. 431; *Torres v. U. S.,* 270 F. (2d) 252 (CA 9th Cir.): Cf. *U. S. v. Arlen,* 252 F. (2d) 491 (CA (2d) Cir.).

Looking at the facts and applying the fair and just test set down in *Giacalone* and *Ungar,* it appears that Petitioner was denied his Constitutional Right to counsel. The "factors" set forth in *Giacalone* are easily applied to Petitioner's Case. The length of the delay requested by Petitioner was for a very short time. In fact only until the case in North Carolina was concluded. The shortness of the delay is emphasized by the call to the Trial Judge by the Trial Judge in North Carolina. (Tr. 10, ff. 38-42.)

Lead counsel did not have associates prepared to try the case in his absence and by his own admission, local

counsel was not in a position to try the case in the absence of Petitioner's chief counsel. (Tr. 7, f. 26 and Tr. 9, f. 35.) Only one other continuance had been requested and received and such was requested due to extenuating and rather tragic personal problems of Petitioner. (Tr. 9, f. 34.) There is nothing in the record that would indicate any inconvenience in delaying the case the short period of time requested. The delay requested was for a completely legitimate reason, was not purposeful, nor dilatory.

Considering the totality of circumstances, it appears that the requested continuance should have been granted and the Trial Judge's failure to do so denied Petitioner of his Constitutional Right to counsel in violation of the Sixth Amendment to the Constitution of the United States. The upholding of the Trial Judge's ruling on the continuance by the South Carolina Supreme Court is adverse to the doctrines set forth in Ungar.

The Constitutional provision requiring due process when applied to the lack of counsel closely parallel the Sixth Amendment right to counsel. In fact a review of cases dealing with the Sixth Amendment of the United States Constitution reveals that the question of whether or not one charged with a crime has been denied the right to counsel is often discussed in the context of whether or not due process has or has not been afforded such person.

In *Powell v. Alabama,* 287, U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, it is pointed out that even though the right of counsel is specifically reserved in the Sixth Amendment, it is also an element of due process. Such a right is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all civil and political institutions'". *Powell* at 287 U. S. 67.

In *Powell* it is also stated:

> If in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by him and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the Constitutional sense.

Petitioner cannot enlarge on the succinct treatment accorded this question in *Powell.*

The question then becomes whether or not Petitioner has been denied the effective assistance of counsel and thus been denied due process. To determine this, we must keep in mind that counsel must be "effective". While Mr. Gatlin appeared on behalf of Petitioner, even though Mr. Gatlin is a competent and experienced criminal lawyer, he stated himself that he was not prepared to proceed with the defense of Petitioner. (Tr. 7, f. 26 and Tr. 9, f. 35.) We must not look only to the degree of competence of counsel to see whether or not it is effective, but we must look to the overall situation.

As Petitioner was tried in absence of his chief counsel, he was denied the effective assistance of counsel and thus has been denied his Constitutional guarantee to due process of law.

Petitioner contends that he was also denied his Sixth Amendment Right to confront the witnesses against him. Petitioner was denied this right, as his chief counsel was denied the opportunity to cross-examine the pathologist that testified as to Mrs. Hampton's death and the cause thereof. Mr. Cooke pointed out to the Trial Judge the necessity and importance of cross-examination by him of Dr. Rutland (Tr. 223, f. 891) and asked the Court to issue an Order for Dr. Rutland to reappear (Tr. 224, f. 893). The Trial Judge did not issue such an Order and an attempt by defense counsel to subpoena Dr. Rutland without

such an Order proved futile. Thus, the limited cross-examination by Mr. Gatlin, who oft times admitted that he was not prepared to proceed with the trial in the absence of Mr. Cooke, resulted in Petitioner being deprived of his right to fully cross-examine a witness against him.

It appears that as Petitioner's chief counsel was not availed the right to cross-examine a material witness against Petitioner, Petitioner was not given a "fair opportunity to cross-examine" the said witness and that the opportunity to cross-examine was not "real". In the language of 21 Am. Jur. (2d), Criminal Law Section 333, Petitioner was allowed a mere "formal proffer of an opportunity" the circumstances being such that he could not effectively avail himself of it.

It is therefore, argued that the refusal of the Trial Judge to issue an Order requiring Dr. Rutland to be recalled and refusing to grant Petitioner's motion for a mis-trial on the basis of Dr. Rutland's unavailability resulted in prejudicial error and violated Petitioner's Constitutional Right.

The right of confrontation has always been deemed one of the most valuable safeguards of the citizen. 21 Am. Jur. (2d), Criminal Law Section 333. The main and essential purpose of confrontation is to secure the opportunity of cross-examination. This opportunity to cross-examine must be real, and a mere formal proffer of an opportunity where the circumstances are such that the accused cannot effectively avail himself of it, violates the right of confrontation.

As Petitioner was not granted the opportunity to introduce former transcribed testimony of a witness unavailable to him for cross-examination the rights guaranteed him under the United States Constitution have been violated.

CONCLUSION

For the foregoing reasons, Petitioner prays that his Petition for Writ of *Certiorari* be granted.

Respectfully submitted,

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Of Counsel

John C. Hayes, III

July 8, 1975

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

THE STATE, RESPONDENT,

versus

JAMES HIRAM FIELDS, JR., APPELLANT

APPEAL FROM YORK COUNTY

JOHN GRIMBALL, JUDGE

Opinion No. 19999
Filed April 16, 1975

AFFIRMED

Keith A. Gatlin and John C. Hayes, both of Hayes, Brunson & Gatlin, of Rock Hill; and Frank Patton Cooke, of Gastonia, North Carolina, for Appellant.

Attorney General Daniel R. McLeod, Deputy Attorney General C. Tolbert Goolsby, Jr., and Staff Attorney Sidney Riggs, all of Columbia; Solicitor Mike S. Jolly, of Union; and Assistant Solicitor William L. Ferguson, of Rock Hill, for Respondent.

NESS, A. J.: Appellant was tried on an indictment charging him with the murder of one Marjorie Hampton on July 5, 1973, which trial resulted in a conviction of murder with a recommendation to mercy, and he was sentenced to life imprisonment. From that judgment and sentence he has appealed to this Court.

He first contends that the trial court abused its discretion in denying his motion for continuance so that an attorney from North Carolina could be present and actively participate during the presentation of evidence to the jury.

Generally, motions for continuance are addressed to the sound discretion of the trial judge whose denial of such motion will not be disturbed on appeal unless there is a clear showing of an abuse of discretion. 7A, South Carolina Digest, § 586.

This Court held in *State v. Edwards,* 86 S. C. 215, 68 S. E. 524, and in *State v. Lytchfield,* 230 S. C. 405, 95 S. E. (2d) 857, that a motion for a continuance on the ground of the absence of leading counsel is properly denied, where defendant is duly represented by his other counsel, who in the instant case participated also in the prior trial which resulted in a mistrial. Also see 17 C. J. S., Continuances, § 41, p. 419; 22A C. J. S., Criminal Law § 527, p. 225.

Appellant next asserts that he was denied his constitutional right to confront witnesses against him when the pathologist, Dr. Rutland, was not recalled for further cross examination by Appellant's chief counsel. Section 26-301, et seq. of the South Carolina Code of Laws prescribes the method by which an out-of-state witness may be made available to the court; however, in the instant case the trial judge was never requested to employ the provisions of this section. It appears, from the record, that Dr. Rutland was present in court for two (2) days, was called as a witness and cross examined on three (3) occasions by Appellant's associate defense counsel, who after this consented to excusing Dr. Rutland, and therefore waived his right to further confront him. The witness had appeared and been cross examined by defense counsel. 21 Am. Jur. (2d), Criminal Law, § 333, p. 361; *State v: Steadman,* 216 S. C. 579, 59 S. E. (2d) 168; 7A, South Carolina Digest, Criminal Law, § 1153(1), p. 462.

Exception seven is neither argued in his brief nor set forth in his statement and is deemed abandoned. Supreme Court Rule 8, § 2; *State v. Lawrence,* filed 12/10/74.

The next exception relates to the jurisdiction of the court, Appellant contending that there was no evidence that the fatal blow was struck in York County, South Carolina. The simple answer to this is § 17-454 of the South Carolina Code of Laws which provides, "when any person

shall be struck—and shall die thereof beyond the limits of the State—the person so striking—shall be subject to indictment—in the county in which the—injury or ill-treatment was committed, in all respects the same as if the death had occurred in such county." *State v. Bostick,* 243 S. C. 14, 131 S. E. (2d) 841; 40 Am. Jur. (2d), Homicide, § 198, p. 478. The evidence, here, was clear that the deceased was assaulted in Clover Grill, Clover, South Carolina; also, there were two (2) other witnesses, a Mrs. Hullett and Mrs. Helms, who testified that they saw the deceased being beaten in York County; finally the defendant admits striking the deceased in York County. This exception is without merit.

The Appellant contends that the trial judge was in error in failing to charge manslaughter. Defense counsel was questioned by the trial judge as to whether they desired manslaughter to be charged and they informed the trial judge they did not wish it to be charged. This assignment of error is likewise without merit. *State v. Epes,* 209 S. C. 246, 39 S. E. (2d) 769; 7A, South Carolina Digest, Criminal Law § 824(1), 847 Cum. Supp.

Appellant next attempts to invoke the doctrine of in *favorem vitae.* We held in *State v. Anderson,* 253 S. C. 168, 169 S. E. (2d) 706, that this doctrine does not extend to cases in which a sentence of less than death is imposed.

The next exception relates to testimony relative to finding blood stains and hair in Appellant's automobile. See 7A, South Carolina Digest, Criminal Law, § 1153(1), p. 462, collecting cases which hold that evidentiary matters are within the discretion of the trial judge. And in 40 C. J. S., Homicide, § 201, p. 1102 it is stated: "Proof of bloodstains at or about the place where violence is alleged to have been inflicted—is competent." Also in Section 215(d) the identical rule is said to be applicable to findings of hair as well as blood, Section 248(1) relates the principle that proof of the presence of bloodstains is evidence tending to prove the situs of the crime. *State v. Brown,* 101 S. C. 404, 85 S. E. 957.

The Appellant next asserts error of the trial judge in failing to grant Appellant's motion for a directed verdict.

This exception contravenes Supreme Court Rule 4, § 6 as it is too general to warrant consideration by this Court. *City of Columbia v. Barr,* 239 S. C. 395, 123 S. E. (2d) 521; 7A, South Carolina Digest, Criminal Law, § 753(2).

Appellant further contends that there was no evidence of malice, which he agrees may be either express or implied; however, the testimony reveals that the Appellant told the deceased, "I'm going to kill you, god damn it." (Tr., f. 362.) Furthermore, malice may be presumed from the intentional doing of an unlawful act without just cause or excuse. *State v. Fuller,* 229 S. C. 439, 93 S. E. (2d) 463.

Finally Appellant contends that the trial judge's charge relating to the acceleration of the demise of a person in poor physical condition constituted a charge on the facts prohibited by the South Carolina Constitution. However, in *State v. Foote,* 58 S. C. 218, 36 S. E. 551 the exact exceptions to analogous instructions were overruled for reasons this Court finds impelling. Also see *State v. Doe,* 218 S. C. 520, 523, 63 S. E. (2d) 303; 40 C. J. S., Homicide, § 11(d), p. 855; *State v. Francis,* 152 S. C. 17, 149 S. E. 348; 70 A. L. R. 1133; 100 A. L. R. (2d) 769, 780.

We have examined the entire record relating to the aforestated exceptions and do not feel that any alleged prejudicial error was committed by the trial judge. We hold that the Appellant had a fair and impartial trial.

AFFIRMED.

MOSS, C. J., LEWIS and LITTLEJOHN, JJ., concur. BUSSEY, A. J., dissents.

BUSSEY, A. J. (dissenting): Being convinced that the record in this case reflects more than one prejudicial error, and that the defendant did not obtain a fair trial, I most respectfully dissent. It is, of course, true that we have repeatedly held that motions for continuance are addressed to the sound discretion of the trial judge and in several cases have approved the denial of a motion for continuance on the ground of absence of so called chief counsel or leading counsel, but in my view, such cases are factually distinguishable from the instant case.

The death of the decedent occurred in Gastonia, North Carolina, and from the outset the accused defendant was

represented by Mr. Frank Patton Cooke of the Gastonia, North Carolina Bar. Mr. Keith A. Gatlin of the Rock Hill Bar was associated by Mr. Cooke solely for procedural purposes. This case was set, by special order of the court, for trial on March 11, 1974. During the week prior thereto Mr. Cooke became engaged in a murder trial in Lincolnton, North Carolina, which trial extended through Saturday of that week and was not concluded until some time on Tuesday, March 12, 1974.

When this case was called for trial on the morning of March 11th, Mr. Gatlin made a motion for a continuance because of the absence of Mr. Cooke. He advised the court that he had been associated only for a limited purpose; that he had been out of town on business over the weekend and had not learned until Sunday night that Mr. Cooke could not get away from the North Carolina murder trial; that he was not prepared to render the defendant a proper defense and stated that there were many witnesses with whom he had never talked. The motion was denied, but the solicitor agreed to delay the commencement of the trial until Tuesday morning, March 12th.

On Monday night the judge presiding over the murder trial in Lincolnton, North Carolina called the trial judge presiding in this case informing him that the murder case there would be concluded during the day of March 12th, but that Mr. Cooke would likely not get back to York before Wednesday morning. On Tuesday morning Mr. Gatlin renewed his motion for a continuance with the solicitor opposing the case being continued even until Wednesday morning. Mr. Gatlin's motion was overruled and the case proceeded to trial in Mr. Cooke's absence with all of the evidence by the State being concluded on Tuesday before Mr. Cooke's arrival. The trial was finally concluded on the morning of Thursday, March 14th.

In fairness, there are some circumstances supporting the denial of a lengthy or indefinite continuance. The case had been previously continued in January since such could not begin until late in the week and it was anticipated that the trial would run into the weekend. A trial had been commenced in February, but a mistrial was ordered ap-

parently for some irregularity prejudicial to the defendant and the State had had some difficulty apparently in getting its witnesses together in order to commence trial on the day set. On the other hand there is no question that Mr. Cooke was in fact the leading counsel in this case and that Mr. Gatlin, as represented by him to the court, was associated for a quite limited purpose and was not prepared to offer the defendant an adequate defense. It should be stated that his performance was creditable for one not adequately prepared. Our prior cases dealing with the refusal of motions for continuance apparently have turned primarily upon whether the refusal thereof worked prejudice to the defendant; this Court apparently never having fully set forth just what criteria or tests a trial judge should consider in the exercise of his discretion as to such motions. Other jurisdictions, however, had done so. In the case of *Giacalone v. Lucas*, 445 F. (2d) 1238 (6th Cir. 1971) the court outlined the following criteria:

> "Proper exercise of this discretion requires a delicate balance between the defendant's right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice. On the one hand, a court may not insist upon expeditiousness for its own sake, but, on the other, a defendant cannot be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. What is a reasonable delay varies depending upon all of the surrounding facts and circumstances. (Citation of numerous supporting authorities). Some of the factors to be considered in the determination of reasonableness are: the length of the delay requested; whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons or whether it is purposeful and dilatory; and other relevant factors."

In the instant case I do not think the public's interest in the commencement of the trial on Tuesday morning

would even commence to outweigh the defendant's right to adequate representation of counsel, which could have been afforded by delaying the commencement of the trial until Wednesday morning. I conclude that His Honor erred in refusing to grant a continuance until at least Wednesday morning, but if my conclusion in this respect be perchance incorrect, I have no doubt that the refusal of the motion for continuance coupled with a later ruling of the court had the effect, in any event, of depriving the defendant of a fair trial. Before proceeding to discuss the other issues, it is well to set forth some of the key facts of the case.

The decedent, Mrs. Marjorie Marie Hampton, aged 33, was, at least inferentially, an alcoholic who resided with her daughter in Goodwill Trailer Park in Gastonia, North Carolina. She had for some time prior to her death worked for and been the girl friend of the defendant at the Clover Grill operated by the defendant in York County, South Carolina. She came to her death at her trailer in Gastonia, North Carolina on the night of July 5, 1973, inferentially at about 8:45 p. m.; the precise time of her death not being established. She was brought to the trailer by the defendant a very few minutes before she expired. An autopsy was performed by Dr. Rutland of Gastonia, North Carolina, who gave as his opinion that Mrs. Hampton died from bleeding to death, "which resulted from a torn or lacerated liver due to blunt force which resulted in trauma to the liver." He testified that she had a grossly abnormal liver, 80% thereof having been replaced by lipid material which gave the liver a fatty appearance, which condition was related to the excessive consumption of alcohol. He further testified that due to the condition of her liver she bruised very readily and that she had numerous bruises, both old and new, about her person. The autopsy also showed that decedent was intoxicated at the time of her death. The State's charge of murder against the defendant was predicated on the theory that he administered to her a beating sufficiently severe to cause the rupture of her liver.

There is evidence in the record to the effect that the decedent was quite drunk at the grill prior to the defendant

taking her home; evidence as to her falling down and injuring herself in the vicinity of the grill. Under the medical evidence the liver injury could have been thus sustained. The Appellant c. sed up the grill because of the drunkenness of the decedent and there is evidence on behalf of the State as to an altercation between the two while in the grill and reference to the decedent repeatedly being knocked into a chair. There is, however, no evidence on behalf of the State tending to prove that the Appellant inflicted upon the decedent any injury of consequence while at the grill.

The defendant admittedly slapped the decedent in the face while in the car between the grill and the trailer in retaliation for her hitting him in the mouth, but denied having struck her any other blow. The strongest, if indeed not the only evidence on behalf of the State tending to prove an assault of any consequence, or the infliction of any injury of consequence upon the decedent by defendant, is the testimony of a Mrs. Hullett, who testified that while driving along the highway she saw a blue car fitting the description of the defendant's car turn into a side road and stop, and that a man therein was striking a woman about the head and shoulders. She viewed such, according to her testimony, about two seconds, drove down the highway a short distance, turned around and came back, and when she next saw the car it was in motion. She knew neither of the parties and did not get the license number of the automobile. If it was, in fact, the defendant who was observed by Mrs. Hullett, this incident occurred, according to her testimony, between 8:15 and 8:30 p. m., less than 30 minutes prior to the expiration of the decedent.

It appears that at the trial in February Dr. Rutland was asked by Mr. Cooke his opinion as to the probable time that elapsed between the infliction of the trauma, which he thought caused the ruptured liver, and the death which followed, and that in response thereto Dr. Rutland testified that in his opinion the trauma occurred anywhere from an hour and a half to two hours before her demise. Other testimony in the record from Dr. Rutland conceded that the ruptured liver could have been caused from the decedent falling down. It is obvious that if the doctor was correct in his opinion as to the time element involved, the assault which Mrs. Hullett testified she observed 30 minutes prior to decedent's death, could not have been the cause of the rupture, a most reasonable inference from all of the evidence being that such occurred when she fell down drunk in the vicinity of the grill.

In the course of the cross-examination of Dr. Rutland at the March trial, Mr. Gatlin either did not recall such prior testimony of Dr. Rutland or else was not familiar enough with the case to recognize the significance thereof. In any event Dr. Rutland was not questioned about the time elapsing, in his opinion, between the trauma and the demise of the decedent.

When Mr. Cooke arrived in court and found that the doctor had not been questioned thereabout he attempted in every possible way to get this critical testimony before the jury. It appears that some difficulty had been theretofore experienced in getting Dr. Rutland to court and there was no way to get him back to court except by an application to and an order of a judge in North Carolina. He being thus, for all practical purposes, unavailable, Mr. Cooke sought to offer in evidence the reporter's tape from the February trial which contained this vital testimony of the doctor, but His Honor excluded such. Under the circumstances I am of the opinion that this evidence should have been admitted and that its exclusion was erroneous and highly prejudicial. Such, coupled with the prior refusal to continue the case until Wednesday morning, resulted in the defendant being deprived of the benefit of evidence, which if believed by the jury, would have warranted acquittal.

In addition to the foregoing, it is my view that there was prejudicial error in the charge, requiring a new trial. The facts of this case, of course, called for His Honor to charge the law applicable to the acceleration of the demise of a person in poor physical condition by a felonious assault. Unfortunately His Honor, as asserted by the appellant, used language which rendered his charge one upon the facts in violation of the Constitution. To put the matter

in the proper perspective, in the case of *State v. Foote,* 58 S. C. 218, 36 S. E. 551, cited by Mr. Justice Ness, there apparently was no dispute about the shot having been fired by the defendant. In the instant case the defendant denied any assault, attack, or infliction of injury whatever upon the deceased other than a single slap to the face in retaliation for a blow by the decedent to his mouth. Language used by His Honor in the charge assumed the truth of the State's evidence and carried with it the implication that His Honor believed such to be true. I quote only parts thereof as follows: "The vitality which the victim possessed **at the moment of accused's attack** and the fact that she would have lived for only a short time in any event are immaterial considerations • • • It is immaterial **that accused did not** know that the deceased was in the feeble condition **which facilitated the killing** or that he did not reasonably anticipate that his act would cause death;". He charged, *inter alia,* that the defendant would not be liable if the death was "not caused or hastened by **the injury inflicted by the accused.**" All such clearly implied to the jury, I think, that His Honor, fully believed that defendant had truly attacked and seriously injured the decedent, but was leaving to the jury only the issue of whether such caused or accelerated her death.

I would reverse and remand for a new trial.

Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-97

JAMES HIRAM FIELDS, JR., PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at 214 S. E. (2d) 320 (S. C. 1975), and is set out in Appendix of Petition.

JURISDICTION

Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I

Did the Supreme Court of South Carolina err in holding that the trial judge did not abuse his discretion, to the effect that Petitioner was denied the assistance of counsel and due process of law, in refusing Petitioner's motion for a continuance?

II

When, pursuant to the provisions of Section 26-301 *et seq.* of the Code of Laws of South Carolina (1962), an out-of-state witness has been made available and cross-examined at trial, is a defendant denied his right of confrontation either by the trial court's failure to order the witness, who has been excused without objection, to reappear or by its failure to receive in evidence said witness' testimony at a former trial?

STATEMENT

Petitioner James Hiram Fields, Jr. is seeking a Writ of Certiorari to review the opinion of the Supreme Court of South Carolina entered on April 16, 1975, affirming his conviction of murder by a jury and corresponding sentence to life imprisonment by the Court of General Sessions of York County, South Carolina.

Petitioner was tried at the March, 1974, term of said court for the murder of Marjorie Marie Hampton. The trial was commenced on March 12, 1974, and concluded on March 14, 1974. Petitioner was found guilty as charged and was sentenced to life in prison.

Frank Patton Cooke of Gastonia, North Carolina, and Keith A. Gatlin of Hayes, Brunson and Gatlin, Rock Hill, South Carolina, were counsel for Petitioner.

Petitioner's case had been first called for trial on January 10, 1974; however, upon his motion for a continuance it was postponed until February 5, 1974. Trial

was commenced at the February, 1974, term of court, but after a day and a half of trial Petitioner's motion for a mistrial was granted. The case was then set for March 11, 1974, by special order of the court.

Mr. Gatlin's March 4, 1974, motion for a continuance on Petitioner's behalf was denied. Upon the call of the case for trial on March 11, 1974, a motion for a continuance was made by Mr. Gatlin upon the ground that Mr. Cooke, characterized by the former as chief counsel in the case, was engaged in the trial of another case in Lincolnton, North Carolina. The motion was denied; however, by agreement of counsel the case was continued until March 12, 1974, whereupon Mr. Gatlin again moved for a continuance on the same ground. The motion was denied, and Petitioner's trial was commenced. Mr. Cooke arrived the following morning.

A Dr. Rutland, a pathologist from Gastonia, North Carolina, who had testified at the February proceeding which had ended in a mistrial, also testified at the instant trial. After considerable difficulty in securing his appearance, Dr. Rutland was present in court for two days and was cross-examined on three occasions by Mr. Gatlin, who thereafter consented to excusing the witness. At the conclusion of Petitioner's case, Mr. Cooke moved the court to issue an order for Dr. Rutland to reappear. After a considerable delay during which efforts were made to secure his reappearance, the trial resumed. Mr. Cooke's motion to admit in evidence Dr. Rutland's testimony at the previous trial was denied.

As indicated hereinabove, the trial culminated in Petitioner's conviction of murder and sentence to life imprisonment, which was affirmed by the South Carolina Supreme Court. It is from the State Supreme Court's opinion that Petitioner seeks this Writ of Certiorari.

ARGUMENT

I

The Supreme Court of South Carolina did not err in holding that the trial judge did not abuse his discretion, to the effect that Petitioner was denied the assistance of counsel and due process of law, in refusing Petitioner's motion for a continuance.

A motion for a continuance, to include one bottomed upon the absence of counsel, is addressed to the sound discretion of the trial judge whose decision will not be disturbed on appeal absent a showing of abuse of discretion and of arbitrariness violative of due process of law. *Ungar v. Sarafite,* 376 U. S. 275, 84 S. Ct. 841, 11 L. Ed. (2d) 921 (1964). Because of this nature of the disposition of a request for a continuance, it has been said that such decisions will not ordinarily be reviewed. *Avery v. Alabama,* 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940). It is respectfully submitted that a Writ of Certiorari should not issue in this instance, for Petitioner has not demonstrated that he will be able to sustain his burden of proving the requisite arbitrariness and abuse of discretion.

No set and definite rules can be laid down governing continuances; rather, each motion for a continuance must necessarily depend upon all the surrounding circumstances, in light of which it is for the trial judge to determine if justice demands or warrants such. *Ungar v. Sarafite, supra.* A review of the surrounding circumstances herein made available to the trial judge reveals a proper exercise of discretion in refusing Petitioner's motion for a continuance.

The homicide for which Petitioner was indicted occurred on July 5, 1973 (T. R., p. 1, f. 1). Frank Patton Cooke of Gastonia, North Carolina, and Keith A. Gatlin of Hayes, Brunson and Gatlin, Rock Hill, South Carolina,

were counsel for Petitioner (T. R., p. 1, f. 2). A preliminary hearing was held, at which Mr. Gatlin was present (T. R., p. 12, f. 46).

Petitioner's case was first called for trial on the morning of Thursday, January 10, 1974. A four-day trial, in the course of which some thirty witnesses would be heard, was anticipated by counsel for both sides (T. R., p. 3, f. 10; p. 4, f. 14; p. 7, f. 25; p. 12, f. 45). Primarily upon Mr. Cooke's assertion that "this case can [not] be tried without going Saturday and Sunday," (T. R., p. 3, f. 10) Petitioner's motion for a continuance was granted (T. R., p. 5, f. 19).

Trial of Petitioner was commenced at the February, 1974, term of court, and after a day and a half of trial, during which only three or four of the State's witnesses had testified, Petitioner's motion for a mistrial was granted (T. R., p. 1, f. 2; p. 11, f. 44). The case was subsequently set for Monday, March 11, 1974, by special order of the court (T. R., p. 1, f. 2).

On March 5, 1974, Petitioner moved that his case be continued from March 11 until the next term of court upon the ground that his daughter and granddaughters had been involved in an accident. This motion was denied, and Petitioner was informed by the trial judge that the same would be called as previously scheduled (T. R., p. 6, f. 22).

Petitioner's case was then called for trial on March 11, 1974, and Mr. Gatlin again moved for a continuance on Petitioner's behalf upon the ground that Mr. Cooke, characterized by Mr. Gatlin as chief counsel in the case, was engaged in the trial of another case in North Carolina. This motion was denied; however, by **agreement of counsel** the case was continued until Tuesday, March 12, 1974 (T. R., p. 1, f. 3).

On March 12 Petitioner's cast was again called for trial, and Mr. Gatlin again moved for a continuance based upon Mr. Cooke's absence. This motion was denied, and Petitioner's trial was commenced (T. R., p. 1, f. 4). Mr. Cooke arrived the following morning.

While in a proper case the Supreme Court of South Carolina has not been opposed to reversing a trial judge's denial of a motion for a continuance in a criminal case premised upon the absence of counsel, *see State v. Spencer,* 177 S. C. 346, 181 S. E. 217 (1935), its decision herein was in harmony with its precedents, with the decisions of the courts of other states, with federal court decisions, and with the decisions of this Court.

The defendant in *State v. Edwards,* 86 S. C. 215, 68 S. E. 524 (1910), represented by two attorneys, had been granted a continuance at a previous term of court. When the case was called for trial at the next term, one of the attorneys moved for a continuance upon the ground of the absence of the other, whose illness was confirmed by a physician's certificate, and upon the further ground that the former "did not feel fully warranted to proceed with the trial." No abuse of discretion was found in the trial judge's denial of said motion. *See also State v. Smoak,* 142 S. C. 37, 140 S. E. 251 (1927), and *State v. Hunter,* 79 S. C. 84, 60 S. E. 241 (1908), wherein there was no abuse of discretion in refusing a continuance based upon the absence of **chief** or **leading** counsel, and *State v. Peters,* 255 S. C. 375, 179 S. E. (2d) 19 (1971).

Noble v. State, 497 P. (2d) 452 (Okla. Cr. 1972), is so precisely in point that the language of the court therein warrants quoting:

> Defendant next contends that the trial court abused it's (sic) discretion in denying his motion for continuance. The motion for continuance contained in the records seeks postponement of trial so that an attorney from Texas could be present and actively participate during the presentation of evidence to the jury. Careful reading of the motion for continuance reveals that the Oklahoma attorney, who represented defendant at trial, quoting the motion itself, "has been handling all matters concerning this Defendant with the advice consent and assistance of the attorney from the state of Texas."
>
> . . .
>
> This Court held in *Woodruff v. State,* 56 Okl. Cr. 409, 41 P. (2d) 129 (1935), and in other cases too numerous to enumerate, that an application for continuance on the ground of the absence of leading counsel is properly denied, where defendant is duly represented by his other counsel.

The identical issues raised by this Petitioner were confronted by the Ninth Circuit Court of Appeals in *Majeska v. United States,* 266 F. (2d) 947 (9th Cir. 1959), *cert. denied,* 361 U. S. 843, 80 S. Ct. 95, 4 L. Ed. (2d) 81 (1959). The defendant therein retained one Hanifin to represent him in the District Court. At his arraignment he was represented by one Alkow, an attorney duly admitted to practice in the court, allegedly as an accommodation to Hanifin. On the day set for trial Alkow again appeared and moved for a continuance upon the ground that Hanifin was engaged in a jury trial elsewhere. The former further represented that he knew nothing about the case and had talked to neither witnesses nor the defendant. A jury was drawn, but the trial was postponed until the following day, whereupon Alkow appeared and again represented that Hanifin was still engaged in another trial. The trial court refused to further continue the case, and the Court of Appeals found no abuse of discretion, noting that the motions had not been made until the day set for trial and that a one-day postponement had been allowed during which arrangements for the defense

could have been made. It should be noted that the identical factors obtained in the instant case.

Petitioner relies primarily upon *Giacalone v. Lucas*, 445 F. (2d) 1238 (6th Cir. 1971); however, application of the factors enumerated therein reveals no arbitrariness violative of due process or abuse of discretion on the part of the trial court and the South Carolina Supreme Court. Inasmuch as a four-day trial was anticipated by all concerned (T. R., p. 3, f. 10; p. 12, f. 45), to have granted Petitioner's motion made on Tuesday, March 12, 1974, would have, in effect, continued the case until the next term of court or have run it into the weekend, the evil sought to be avoided by the trial judge's grant of Petitioner's first motion for a continuance. Notwithstanding his claim of unpreparedness, it appears that Mr. Gatlin, a competent and experienced criminal lawyer, "ha[d] been in the case from the beginning. He attended the Preliminary Hearing and made the motion for a continuance in January and joined in the motion for the mistrial in February and made the motion last Monday morning for a continuance and yesterday for a continuance and he [was] accompanied by the investigator out of Mr. Cooke's office." (T. R., p. 12, f. 46). In this latter regard it is worthy of note that it was said investigator who "had handled the investigation and trial preparation" (Petition p. 6, lines 29-30). Three other continuances had been requested by Petitioner, the first of which had been granted by the trial court and the last of which had been allowed via agreement of counsel. Finally, numerous witnesses had been subpoenaed on behalf of both the State and the defense, to include in-state and out-of-state lay witnesses, in-state and out-of-state law enforcement officers, and an out-of-state expert witness. Also, five additional jurors had been drawn (T. R., p. 11, f. 44). In light of these factors made available to the trial judge at the time the motion was denied, it is respectfully submitted that the conclusion of this Court in *Ungar v. Sarafite, supra,* is equally applicable to the case at hand:

> Given the deference necessarily due a state trial judge in regard to the denial or granting of continuances, we cannot say these denials denied Ungar due process of law. 376 U. S. at 591.

II

When, pursuant to the provisions of Section 26-301 et seq. of the Code of Laws of South Carolina (1962), an out-of-state witness has been made available and cross-examined at trial, a defendant is not denied his right of confrontation either by the trial court's failure to order the witness, who has been excused without objection, to reappear or by its failure to receive in evidence said witness' testimony at a former trial.

The relationship of the question here posed to Question I is obvious, as was recognized by the trial judge (T. R., p. 231, f. 922), and Respondent submits it is equally without merit. When, pursuant to the provisions of Section 26-301 *et seq.** of the Code of Laws of South Carolina (1962), entitled "Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings," a trial judge of this state issues a certificate to the effect that an out-of-state witness is a material witness in a criminal prosecution pending herein, a judge where

* South Carolina Code § 26-307 provides: "If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence in this State is a material witness in a prosecution pending in a court of record in this State or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Such certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State. The certificate shall be presented to a judge of a court of record in the county in which the witness is found."

the witness is found issues a summons directing said witness to attend and testify, and the witness attends and testifies, it is difficult for Respondent to conceive how a defendant can claim he has been denied his right of confrontation.

In *People v. Pickett,* 339 Mich. 294, 63 N. W. (2d) 681 (1954), it was held that the constitutional right of confrontation is satisfied if an accused has been once confronted by the witnesses against him at any stage of the proceedings on the same accusation and has had the opportunity to cross-examine by himself or counsel in his behalf. *See also* 21 Am. Jur. (2d) *Criminal Law* § 343 (1965). Inasmuch as Petitioner was confronted by Dr. Rutland, a North Carolina pathologist and the witness in question, who was subjected to cross, re-cross, and yet re-cross examinations, certainly it can be said that he was afforded his right of confrontation.

Although he indicated a willingness "to do all I can to get [Dr. Rutland] here," to include "delay[ing] the matter a reasonable length of time," (T. R., p. 288, f. 911) it should be noted that the trial judge was never requested to again employ the provisions of Section 26-301 *et seq.;* rather, he was asked, and error is assigned to his refusal, to issue an order for Dr. Rutland to reappear (T. R., p. 244, f. 893). In this regard the South Carolina Supreme Court's language in *State v. Murphy,* 48 S. C. 1, 25 S. E. 43 (1896), is appropriately quoted:

> But there is no authority for the issuance of compulsory process for a witness out of the jurisdiction of the courts of this state. Such a writ would be wholly nugatory beyond the limits of the state and, of course, could be ignored and disobeyed by all persons with impunity. There was no error, therefore, in refusing to attempt such a thing.

See also State v. Rasor, 168 S. C. 221, 167 S. E. 396 (1933).

The right of confrontation is a personal privilege which may be waived by express consent, by failure to assert the right in time, or by conduct inconsistent with a purpose to insist on it. *See Illinois v. Allen,* 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. (2d) 353 (1973); 21 Am. Jur. (2d) *Criminal Law* § 344 (1965); 23 C. J. S. *Criminal Law* § 1009 (1961). Because Petitioner consented to the excusing of Dr. Rutland so as to allow him to return to his residence without the jurisdiction of the court (T. R., p. 89, f. 356—p. 90, f. 357), it is respectfully submitted that he waived his right to further confront him.

The confrontation requirement has two purposes. The main one is to secure the opportunity for cross-examination. The secondary purpose is the advantage to be obtained from the personal appearance of the witness to the end that the jury is enabled to obtain the elusive and incommunicable evidence of the witness' deportment while testifying. *Barber v. Page,* 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed (2d) 255 (1968); 21 Am. Jur. (2d) *Criminal Law* § 333 (1965). While it is true that this secondary purpose is sometimes outweighed by the necessity for a witness' testimony so that testimony given at a former trial is admissible where under certain circumstances the witness is unavailable, *see Mancusi v. Stubbs,* 408 U. S. 204, 92 S. Ct. 2308; 33 L. Ed. (2d) 292 (1972), this exception has no application where the witness is available and does, in fact, testify. *Piassick v. United States,* 253 F. (2d) 658 (5th Cir. 1958). In such cases the secondary purpose of the confrontation requirement is not outweighed by the necessity for the witness' testimony.

Finally, it has been held that the admissibility of testimony given at a former trial is addressed to the sound discretion of the court. 22 C. J. S., *Criminal Law* § 893 (1961). Inasmuch as Dr. Rutland was present in court for two days and was cross-examined on three occasions by

defense counsel, Respondent submits that Petitioner has not demonstrated the requisite abuse of discretion in the tral judge's refusal to receive in evidence Dr. Rutland's testimony at the former trial.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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